State of New York
Unified Court System
Tribal Courts Committee
serving the
New York Federal-State-Tribal Courts
and Indian Nations Justice Forum
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January 25, 2016

BY FAX AND FEDERAL EXPRESS
Chief Eric Thompson
Chief Ron LaFrance
Chief Beverly Cook
St. Regis Mohawk Tribal Council
412 State Route 37
Akwesasne, NY 13655

Re: Proposed New York State/St.Regis Mohawk Tribe
Native Bail Reform Initiative

Dear Chief Thompson, Chief LaFrance and Chief Cook:

I send my greetings and good wishes for the New Year. I have been asked by St. Regis Mohawk Tribal Court Chief Judge Peter J. Herne to provide background information to the members of the Tribal Council on a very exciting pilot project for reforming the current practice of New York's state and local criminal courts in setting monetary bail determinations in cases involving Native arrestees.

As each of you knows, I have been designated by New York State Chief Administrative Judge Lawrence Marks to head his Tribal Courts Committee, and have served as the convener of the New York Federal-State-Tribal Courts and Indian Nations Justice Forum since its creation in 2003. The Forum was launched at the suggestion of then-Chief Judge Judith Kaye as part of a project of the Conference of Chief Justices to promote justice and resolve jurisdictional conflicts among our respective justice systems. The Forum has met semi-annually since that time and has enjoyed the participation of all nine of the tribal nations resident in and recognized by the State of New York. The St. Regis Mohawk Tribe has actively participated in our programming since the Forum's earliest days, and we have been honored by the attendance of chiefs and sub-chiefs of your nation at our meetings and programs. My former co-chair of the Tribal Courts Committee, the late Justice Edward Davidowitz, and I, along with the former Chief Judge of the United States District Court for the Northern District of New York, the Honorable Norman Mordue, had the pleasure of visiting Akwesasne to tour the reservation and meet with your

leaders a few years ago. We are quite proud of the work we have all done together at the Forum, when we bring our good minds and commitment to a project. We have received national recognition for our work, including this past year in securing the adoption of a court rule for New York State courts providing for the recognition of tribal court judgments, orders and decrees.

In 2013, Chief Judge Herne brought to the attention of the Forum the unique problems faced by Native individuals in satisfying monetary bail requirements imposed by state and local courts.[1] As Judge Herne explained at that and subsequent Forum meetings over the next two years, while the topic of bail reform has been widely studied and discussed in recent years, one aspect of the inequity of the monetary bail system which has escaped notice in all the talk of reform is the particularly inequitable and disparate impact of New York's monetary bail system on Native American arrestees. Since 1948, when New York State was granted the authority by Congress to exercise its criminal jurisdiction in Indian Country within its state borders,[2] Native arrestees frequently lack the opportunity theoretically available to their non-Native counterparts of posting monetary bail using one of the most commonly employed forms of statutorily authorized bail, namely, an insurance company bail bond.[3] This avenue for pre-trial release is often not realistically available to Natives, because alienation of real property within tribal nation territory is often prohibited by federal or tribal nation law. Under such circumstances, bail bond companies refuse to accept such real property as collateral to secure the bond. Accordingly, where a significant amount of bail is set at arraignment, while a non-Native of modest means might have difficulty obtaining a bail bond to secure release, a Native of similar economic status could find it an impossibility. Such a circumstance leaves the Native defendant detained in county jail, and frequently results in a guilty plea, whether well-advised or not, in order to secure release from that detention. The insidious impact of a state criminal conviction for a Native reservation resident extends beyond the creation of a criminal record, as even a non-violent conviction may disqualify the person from many of the opportunities for federal government-supported employment available within the territory.

Judge Herne's discussion built on the call for significant reform of New York's bail system raised by New York's then-Chief Judge Jonathan Lippman in his State of the Judiciary address in early 2013. Over the course of the ensuing two years, members of the Forum explored

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[1] Although New York law provides for the setting of bail in any of several alternative forms, the customary practice among New York courts is to set bail in the alternative forms of cash and insurance company bond, effectively creating a monetary bail system.

[2] *See* 25 U.S.C. §232 (1948).

[3] *See* New York Criminal Procedure Law §§520.10(1)(b); 520.20.

avenues for educating New York state and local criminal court judges on alternative bail settings available under current law, and followed proposed legislative reforms in Albany and educational efforts by the bar. Although changes in the law have not yet been adopted by the Legislature, we determined to develop judicial training programs for state and local judges to educate them on the issue as to Native defendants and to remind them of the non-monetary options available to secure attendance under the existing law.

This summer, I convened a small group of lawyers from three of the tribal nations (Chief Judge Herne and his law clerk, Lisa Garabedian; Chief Harry Wallace, from Unkechaug; and Marguerite Smith, Esquire, from Shinnecock) to focus on how we might address this problem. I felt that if we came up with a sound, well-researched proposal, Chief Judge Lippman would be very likely to support it, given his deep commitment to bail reform. We did some research on approaches taken in various jurisdictions to obviating the unjust impact of monetary bail, and were most impressed by two programs currently operating–very successfully–in New York City. These pre-trial supervised release programs were developed and are operated by the New York City Criminal Justice Agency, which has programs for arrestees charged with felonies in Queens and New York Counties, and by the Center for Court Innovation, which operates a program for those charged with misdemeanors in Kings County. Both agencies' programs had been launched with the support of Chief Judge Lippman and the State Unified Court System. In these programs, the state arraignment court judge may approve diversion of individuals detained in jail in lieu of bail to supervision by the program personnel, who assure their adherence to curfews, meet regularly with them, and refer them to appropriate programs for services such as mental health treatment, drug or alcohol treatment, vocational skills training or educational support. Research studies show that each of the three programs has been able to demonstrate significant success in assuring that defendants returned for their scheduled court appearances: the compliance rate was approximately 87 percent, on par with individuals whom the courts had released on recognizance without requiring the posting of bail. My own experience with the CJA program, although limited, has been very positive. And upon my interviewing their directors, each program expressed a willingness to help the Forum develop a similar program designed for Native arrestees in New York state courts outside of New York City.

Our small Forum working group decided that an appropriately designed pre-trial supervised release program for Native arrestees would not only offer otherwise jailed individuals a chance for release without the necessity of posting monetary bail and link them with services to enhance their rehabilitation. Such a program, we felt, would also recognize that confinement and isolation from the community is not always a traditional or culturally relevant punishment, much less pre-trial supervision method, in Native communities. We sought information on the greatest incidence of Native arrestees passing through the state and local courts. Reviewing data provided by the New York State Division of Criminal Justice Services, we concluded that

outside of New York City, the Bombay Town Court and the Salamanca City Court handled the highest numbers of Native defendants.[4]

By late July, we had put together a proposal to Chief Judge Lippman for a pilot Native pre-trial supervision program in one of the local courts in New York. He enthusiastically approved the idea, and in September, I met with Chief Administrative Judge Lawrence Marks to discuss the plan for the project and the role of the state court system in it. Judge Marks carefully reviewed the various facets of the program, and suggested that we undertake the pilot program in the Bombay Town Court. One of the reasons for selecting that court was its successful ongoing working relationship with the SRMT Tribal Healing-to-Wellness Court, to which Town Court defendants residing on the reservation have been referred for monitoring and supervision of their drug treatment during the pendency of their cases. It was felt that siting the pilot with the Bombay court and partnering with SRMT justice and social service personnel offered the greatest opportunity for success of the program. It was anticipated that the program, once operating smoothly, could be expanded to other courts around the state.

Chief Administrative Judge Marks committed the following members of the Unified Court System to work on plans for the pilot program: the undersigned, and Justice Sharon Townsend of Erie County, the chair and a vice chair, respectively, of his Tribal Courts Committee; the Director of the Office of Court Administration's Office of Policy and Planning, Justice Sherry Klein Heitler, who launches innovative programs for the courts throughout the state; Mr. Frank Woods, a grant-writer for OCA; Administrative Judge for the Fourth Judicial District Vito Caruso; Franklin County Acting Supreme Court Justice Robert G. Main; Fourth Judicial District Town and Village Court Supervising Judge and St. Lawrence County Court Judge Jerome Richards; Bombay Town Justices Terrance Durant and C. Curtis Smith; Director of the Office of Justice Court Support, Justice Nancy Sunukjian; and Special Counsel to the Town and Village Justice Courts Matthew Chivers.

Judge Marks also supported the commitment we had secured from the Center for Court Innovation to partner with us in the project. We are very pleased that Aaron Arnold, Director of CCI's Tribal Justice Initiative, enthusiastically agreed to join us. He has committed two of his staff members to the project, and, of course, has access to the wealth of information on pre-trial supervised release garnered by his colleagues who have been operating CCI's program in Brooklyn so successfully. I understand that Chief Judge Herne has recently visited the Brooklyn program to observe its operations.

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[4] We would be glad to make available to the Tribal Council either the full data set we received from DCJS, or the relevant excerpts upon which we relied.

By October, the original small working group of four Forum members had thus conceived the first Native Bail Reform Initiative pilot project. The project has two components: a special Native pre-trial supervision project involving the Bombay Town Court and operating in conjunction with service providers in the SRMT territory, modeled on the CCI and CJA programs in New York City, but specially designed for the realities of rural court practice and the needs of the Native arrestees; and the development of training programs for local court judges on alternatives to monetary bail and the unique need for momentary bail alternatives for Native arrestees. At its October 29, 2015 meeting, the Forum enthusiastically endorsed the NBRI. The bulk of the discussion actually involved requests from tribal court judges and lawyers from around the state for early expansion of the Bombay-SRMT supervision pilot to venues in their regions. Sub-Chief Cheryl Jacobs was present for the discussion of the project at that meeting.

The NBRI project committee convened shortly thereafter, recognizing that a launch of the project in 2016 would require the preparation of a formal grant proposal by February 2016. In addition to the previously-mentioned representatives from the Unified Court System, Center for Court Innovation and the Federal-State-Tribal Courts Forum, the critical stakeholders participating in the committee's meetings have included several officials from the SRMT Tribal Court: Chief Judge Herne; Treatment Coordinator Micaelee Horn; Court Clerk Isaac White; Court Administrator Phillip Barreiro; and Law Clerk Lisa Garabedian.[5] Thus far, meetings have included: an organizational conference call on November 4; a three-day session of the critical stakeholders mentioned above which included site visits to observe both the Bombay and Akwesasne courts and an all-day planning workshop to discuss the features of the program December 8-10; a half-day meeting January 8 to review project development and a draft report/proposed grant application on the project, at which other key stakeholders were identified for consultation on the outline of the project; and another half-day meeting to refine the project with critical as well as key local stakeholders, including representatives of the Franklin County District Attorney, Public Defender, Conflicts Defender, Probation Department and Sheriff's offices. Further adjustments were made in the proposed operation of the NBRI pre-trial supervision program and the draft report/grant application based upon the comments made at that meeting.

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[5] The involvement of officials from the Tribe's court exclusively at this point in no way reflects any view of the project committee, the Forum or the Unified Court System that the tribal-based entity providing supervision services for the project necessarily must be part of the SRMT Tribal Court. Rather, that is one, of several, possible options. Others might include an SRMT social service agency, or a newly conceived entity staffed by members of the Tribe. The project committee would welcome participation from social service specialists or other tribal representatives as we further refine the project.

At this writing, the NBRI pre-trial supervision pilot project awaits the approval of the St. Regis Mohawk Tribal Council. The project committee and the Forum stand ready to answer any questions you have about the project. Our goal is to have a tribal-based entity submit an application for a federal CTAS grant by the due date of February 23. If the Tribal Council wishes to review the current draft of the proposal, I believe that can easily be arranged.

We are very proud of the fact that the United States Department of Justice has expressed its enthusiasm for this pilot project and its desire to fund development of a culturally appropriate risk assessment instrument for Native arrestees, such as we plan to create for use in the NBRI. The initiative will be breaking new ground in this important area, and is already being heralded as a model for the nation.

We thank you for your consideration of this exciting project and would welcome your input.

Sincerely yours,

Marcy L. Kahn

MLK:ob
cc: Honorable Robert G. Main
Chief Judge Peter J. Herne
Honorable Sharon Townsend
Mr. Aaron Arnold